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In The

Supreme Court of the United States

October Term, 1998

QUALITY PROFESSIONAL NURSING, INC., CRITICAL HEALTH CARE, INC., A COMPLETE HEALTH SERVICE, INC., ALL CARE NURSING SERVICE, INC., AND THE PDQ NURSE, INC.,

Petitioners,

v.

BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, BOCA RATON COMMUNITY HOSPITAL, INC., SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., and HIGH TECH STAFFING SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONERS

There are no other corporations which are related to the corporations which are the petitioners herein.

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ARGUMENT

In their Petition for Writ of Certiorari ("Pet."), petitioners showed, largely through respondents' own documents and testimony, that the Preferred Provider Program ("PPP") was created by competing hospitals for the express purpose, and with the effect, of halting further free-market price increases during a shortage of nurses. Thus, under well-settled principles of antitrust law, the PPP must be condemned *per se* both as horizontal price fixing (broadly defined to encompass stabilizing and capping of prices), as well as a group boycott in furtherance of price fixing (because the hospitals jointly agreed not to use non-Preferred agencies except on a discriminatory, last-resort basis, to force bidding agencies to submit low bids or risk exclusion).

Respondents, in their Opposition ("Opp."), do not dispute these key facts. They cannot disagree that capping and stabilizing prices was a central goal of the PPP; or that the contracts with the Preferred agencies froze their prices for a year; or that each Preferred agency was required to enter into identical contracts, with identical pricing, with each of the 12 participating hospitals; or that petitioners' nurses deserted them, as respondents' personnel expected; or that after the PPP was preliminarily enjoined, prices again shot up.[1]

Instead, respondents obfuscate the true nature of the PPP in order to persuade this Court to permit it to escape *per se* condemnation. In so doing, they underscore the danger in allowing the Eleventh Circuit's decision below to stand: It signals that competitors, especially in the health care field, can stand the law of supply and demand on its head and still escape antitrust liability, simply by using sophisticated

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[1] That these key aspects of the PPP are beyond dispute led the Eleventh Circuit to conclude: "If we decide the PPP is deserving of per se treatment the case ends; plaintiffs-appellants must win." (Pet.App. 12 n. 12.) The Request for Proposal ("RFP"), sent out by the South Florida Hospital Association ("SFHA") on the hospitals' behalf, underscores that the PPP was a price-fixing and group boycott arrangement. (See Opp.App. 43-61, especially ¶¶ 7, 13, 15, 16, 19, 30, and 59.)

schemes, blatantly concocted to achieve price fixing, so as to appear too complex and novel for imposition of *per se* illegality – a classic elevation of form over substance.[2]

Respondents' obfuscation is evinced by four entirely spurious lines of defense at the crux of their Opposition:[3] (1) that the PPP was merely procompetitive group buying, even though no group buying ever was to take place; (2) that unspecified "efficiencies" and the inclusion of separable (but never implemented) quality assurance functions in the price-fixing scheme exempt it from *per se* illegality; (3) that injury to consumers and market power must be shown by petitioners, even though settled law is squarely to the contrary; and (4) that some insupportable "economic necessity defense" justifies the hospitals' price-fixing arrangement.[4]

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[2] This Court need only review respondents' 16-page Corporate Disclosure Statement (Opp.App. 83-98) to see that many large, publicly-traded companies, owning hospitals across the nation, are involved here and have a stake in the outcome.

[3] Respondents also contend – without legal support – that the hospitals did not agree on specific price levels, and that "any supply contract 'stabilizes' prices" (Opp. 22). But the hospitals jointly agreed which bid prices to accept, and purposely created the mechanism by which prices were to be stabilized, giving rise to liability under well-settled principles enunciated by this Court (see Pet. 19-23). And while any one-on-one contract "stabilizes" prices *pro tanto*, the terms of the contracts under the PPP were set by **joint** conduct among competing hospitals. "Every such horizontal arrangement among competitors poses some threat to the free market." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 (1990).

[4] Respondents' Appendix includes chopped-up excerpts from trial testimony, devoid of identification of the witnesses. Worse, many of respondents' factual assertions in their brief are not, upon inspection, supported by their cites to their Appendix, and in fact are contrary to the record (*e.g.*, their assertion that the shortage ended [Opp. 3]). To correct key misstatements, petitioners have included an Appendix ("Rep.App.") herewith.

I. NO GROUP BUYING EVER OCCURRED UNDER THE PPP, AND THUS IT CANNOT QUALIFY AS A BENIGN GROUP BUYING ARRANGEMENT

Respondents disingenuously assert that "the Program utilized the familiar mechanism of a group buying program" (Opp.Br. p. 6), despite the proof, in their own RFP (Opp.App. 43-61), that **there was no group buying under the Program**, no aggregation of purchasing volumes, no volume assurances at all, and express provisions that any purchases would be one-on-one between an individual hospital and a Preferred agency (albeit at the prices determined collectively):

> The South Florida Hospital Association is neither the guarantor nor the indemnitor nor makes any warranties, whatsoever, either as to any minimum aggregate volume of services utilized by the participating hospitals nor as to any other question involving the contractual relationship, which may arise between the agency and individual hospitals. [Opp.App. 44.]
>
> * * *
>
> 9) *MEMBERS WILL CONTRACT DIRECTLY* with the awarded Agency(ies). Members will remit payments directly to Agency(ies) after receipt of correct invoices. [*Id.* at 48.]
>
> * * *
>
> 17) *ESTIMATED VOLUMES*: The volumes indicated on page 20 is [sic] an estimate only AND should not be construed as a volume guarantee, either expressed or implied. Usage information was obtained from surveys of participating hospitals and are [sic] submitted for informational purposes only. [*Id.* at 50.]

Respondents' defense of legitimate group buying arrangements – under which smaller buyers pool their purchasing volumes to get lower prices enabling them to compete with larger buyers (*Northwest Wholesale Stationers, Inc. v. Pacific Wholesale Stationery & Printing Co.*, 472 U.S. 284, 295 (1985)) – is inapt. Respondents make no effort to identify

any larger buyers getting lower agency prices with which respondents sought to be competitive (there were none), and can point to no procompetitive benefits of the PPP's price-fixing and group boycott features.[5]

Respondents attempt to deceive this Court about the PPP's nature, by asserting that the "participating hospitals agreed to utilize the preferred agencies first, **thereby increasing their sales volumes**" (Opp. 16-17; emphasis added). However, the record below shows that precisely the opposite happened, **as even the hospitals' own economic expert conceded**, and other defense witnesses confirmed (Rep.App. 1-3, 9-15).

Respondents also disingenuously assert (Opp. 6-7) that the PPP "integrated certain purchasing functions." However, **none** of the three functions they enumerate – a quality assurance "nurse liaison," assessment of a fee to cover her expense, and the decision of which agencies would be boycotted – had any connection to the purchasing of nursing services.[6] **After** each agency was forced to conform its prices to each hospital, regardless of volume usage, **every aspect of actual purchasing** – *i.e.*, every purchasing function – was done separately by

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[5] Respondents incorrectly, and without support, state that "every joint purchasing agreement entails an agreement whereby purchasers literally 'fix' prices and 'refuse to deal' with certain suppliers" (Opp. 15). Rather, legitimate group buying arrangements enable smaller buyers to obtain prices already freely available on the open market to any buyers offering comparable volume – there is no "fixing" of prices (however defined) contrary to free-market forces. Hence, as this Court noted in *Northwest Wholesale*, *supra*, 477 U.S. at 296, unless a buying group possesses market power (or exclusive access to an essential element to compete), no concern arises that its conduct would have anticompetitive effects. But this point is irrelevant, because the PPP did not involve group buying at all.

[6] Rep.App. 7-8. The lack of any nexus between the nurse liaison and purchasing functions is shown by the fact that, for the PPP's duration, the nurse liaison implemented no quality assurance procedures whatever, despite the purchase of "$2 million in temporary services" (Opp. 8). See Rep.App. 4-6.

each hospital, **not** in a collective or integrated manner. Respondents can offer no evidence to the contrary.

In sum, when the dust of respondents' phony "group buying" claim settles, all that remains is that under the PPP, the hospitals jointly fixed the terms of all later, individually-made purchases, falling squarely within the ambit of *per se* illegal conduct under joint guidelines of the Department of Justice and the FTC (see Pet. 26-27 n. 18).

II. RESPONDENTS CANNOT SHOW THAT QUALITY CONCERNS NECESSITATED PRICE FIXING OR GROUP BOYCOTTING OF AGENCIES

Respondents (Opp. 22-24) woefully misconceive the thrust of this Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). There is a presumption favoring rule-of-reason treatment where conduct is not shown to fall into a recognized category of *per se* illegality. But where conduct is shown to fall into a *per se* category – such as horizontal price fixing, and group boycotts in furtherance of price fixing – the *per se* rule governs. As this Court held in *Superior Court, supra*, 493 U.S. at 433, the *per se* rule has the same force as other statutory commands and must be applied by the courts. And where, as here, the challenged conduct, in substance, falls squarely within a *per se* illegal category, it must be condemned, unless it qualifies for the very narrow escape hatch under *BMI* and its progeny (see Pet. 23-25). No such showing has ever been made here, and respondents offer none.

Respondents' confusion is evinced by their assertion that group buying arrangements amount to literal price fixing (an error addressed above), leading them to err in concluding that the rule-of-reason treatment of buying cooperatives under *BMI* requires that horizontal price fixing by buyers also receive lenient treatment. *BMI* says nothing of the kind.[7]

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[7] In *BMI*, this Court noted that the arrangement in question there – *viz.*, blanket licensing of music – "is of course potentially beneficial to both

Respondents predictably focus (Opp. 4-5) on perceived quality problems that hospitals were experiencing with agencies and agency nurses. However, no showing is made, or even attempted, that the hospitals needed the price-fixing and group boycotting features of the PPP to address quality concerns – *i.e.*, that the price-fixing and boycotting features were ancillary to otherwise unattainable procompetitive benefits. Respondents do not dispute that the hospitals already had "do not use" lists of unsatisfactory nurses which they could have exchanged (see Pet. 24 n. 16).

Instead, respondents again misrepresent the record, and even contradict themselves by asserting that "[t]here were no ready means for effectively sharing this information [about unsatisfactory nurses]" (Opp. 4), shortly before admitting that there was already a Palm Beach County Nursing Administrators Association (Opp. 6). Indeed, defense witness June Daugherty, of participating hospital Palms West, testified that agency problems were already being discussed by that group, and that she knew of no reason why quality concerns could not have been discussed without addressing prices (Rep.App. 16-17, 7).

III. RESPONDENTS ERR IN ASSERTING THAT *PER SE* CONDEMNATION REQUIRES SHOWINGS OF CONSUMER INJURY AND MARKET POWER

Respondents incorrectly assert that there must be a showing of detriment to consumers, such as higher prices or output

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sellers and buyers, differentiat[ing] the blanket license from individual use licenses" (441 U.S. at 21). Here, the PPP was not beneficial to agencies (even Preferred agencies, Opp. 10-11) or to nurses. Respondents dispute that agencies were "forced" to submit bids (Opp. 18), but offer no basis for their position; in contrast, petitioners showed that no hospital acting alone could have imposed the price-freeze that respondents imposed (Pet. 4), and that the agencies did not favor having the PPP – including respondent High Tech Staffing Services, which bid under coercion, fearful of losing its million-dollar business (Pet. 5-6 n. 5).

restrictions, to trigger *per se* illegality.[8] But as this Court noted in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948):

> It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers.

Respondents' assertion that consumer injury is required would mean that any price-fixing conspiracy among buyers, engaged in to lower their own costs artificially but without raising consumer prices, would escape *per se* condemnation. That is not the law, as even the Eleventh Circuit below recognized (Pet.App. 13). Rather, it is settled that consumers benefit most from open competition, the value of which is beyond challenge. *Superior Court, supra*, 493 U.S. at 424.[9]

Respondents also seek to distinguish the Seventh Circuit's *per se* condemnation of conduct among competing buyers of durum wheat in *National Macaroni Manufacturers Association v. FTC*, 345 F.2d 421 (7th Cir. 1965), by insisting that the key factor there was the defendants' possession of market power (Opp. 19). To the contrary, the Seventh Circuit squarely held that it "makes no difference . . . whether the participants possess market control. . . . " 345 F.2d at 427.[10]

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[8] Respondents ignore petitioners' showings that rising pre-PPP prices were inducing nurses to return to the market (Pet. 4), but that the PPP, by freezing prices, exacerbated the shortage and restricted nursing service output (Pet. 28-29). Ironically, respondents complain about "phantom" and "blind" booking (Opp. 4), problems stemming from the shortage and worsened by the PPP.

[9] On this same flawed basis, respondents (Opp. 20-21, 25-26) improperly seek to distinguish this Court's rulings in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), *Superior Court, supra*, and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[10] The output restriction caused by the PPP, and its blatant tampering with free-market pricing mechanisms, also would merit condemnation of the PPP under the rule of reason, without determination of relevant market

IV. COMPETITION FROM AGENCIES FOR NURSE ALLEGIANCE, AND UNWANTED CONSEQUENCES TO HOSPITALS ARISING FROM THAT COMPETITION, CANNOT JUSTIFY PRICE FIXING

Respondents (Opp. 2-4) seek to fashion a new "economic necessity defense" by asserting that the nursing shortage and the resulting agency price increases wreaked havoc for the hospitals, as they competed for patients. However, as this Court noted in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), in discussing and quoting from *Socony-Vacuum*, *supra* (which dealt with the converse situation of competitors jointly seeking to cope with a surplus):

> In that case a glut in the spot market for gasoline had prompted the major oil refiners to engage in a concerted effort to purchase and store surplus gasoline in order to maintain stable prices. Absent the agreement, the companies argued, competition was cutthroat and self-defeating. The argument did not carry the day:
>
> > "**Any combination which tampers with price structures is engaged in an unlawful activity.** Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or

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and market power issues (Pet. 28-29). Respondents (Opp. 27 n. 7) demonstrate complete misunderstanding of these principles, by citing to this Court's discussion of **tying** claims in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-30 (1984), and to two Tenth Circuit decisions dealing with denial of physician staff privileges and replacement of plaintiff radiologist group with another group, where no showing was made that the defendants' conduct did more than affect the plaintiffs themselves – in stark contrast to the instant case, where injury was shown to petitioners, other non-Preferred agencies, and even the Preferred agencies (Pet. 10-11). Respondents' assertion (Opp. 8-9) that the PPP did not injure the petitioners, aside from being wrong, should be addressed by a jury upon remand of this action following reversal by this Court.

> stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left us with the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. **It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies.** It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the combination. If such a shift is to be made, it must be done by the Congress. . . . " [*Socony-Vacuum*, 310 U.S. at 221-22.]

Arizona, 457 U.S. at 345-46 (emphasis added).

Here, the respondent-hospitals cannot even complain of "ruinous competition and competitive evils." Despite their vague cries of higher nursing agency prices and budgeting difficulty, nowhere, either in their Opposition or in the record below, have the hospitals ever shown that agency competition caused any hospital to be in danger of going out of business, or even to become briefly unprofitable. (The only "ruinous" effects here were those caused by the PPP itself, which proved catastrophic for the petitioners, as shown by the unchallenged evidence of the massive desertion of their nurses in the wake of the PPP [Pet. 10 & n. 7].) But even if the hospitals had suffered disastrous consequences from competition with the agencies, their efforts should have been directed to Congress, not to taking the law into their own hands through the PPP. It is now left to this Court to redress this wrong, and to undo the damage which the Eleventh Circuit's ruling below poses to the free market.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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EXCERPTS FROM TRIAL TESTIMONY OF IRA HOROWITZ, DEFENSE WITNESS, ECONOMIC EXPERT FOR RESPONDENTS/DEFENDANTS

[p. 4634] Thereupon, IRA HOROWITZ, called as witness on behalf of the Defendants, having previously been by the Court duly sworn, testified further as follows:

. . .

[p. 4659] Q. There was absolutely zero volume guarantee in that program; isn't that true, doctor?

A. Oh, that's correct.

Q. Okay. And in fact, what happened to those preferred provider agencies was that their volumes did not go up because of that program; isn't that true?

A. Yes, I believe that's true.

Q. In fact, their volumes went down, didn't they?

A. Over what period are we talking about?

Q. Oh, let's just talk about January 1989. That would be a peak time for hospitals to be wanting to rely on temp agencies, correct?

A. Yes, I believe that's true.

Q. There's evidence in this case that in fact au contrare in January of 1989 the preferred provider agencies were finding that the hospitals were calling them less and less, isn't that true?

A. I am only hesitating because I simply don't recall those details. But if you tell me it's true, I am happy to accept that fact, yes.

Q. Well, your understanding is that this [p. 4660] program officially took off, it was put into effect in early November of 1988, correct?

A. Yes.

Q. And you understand that February 21, 1989, an injunction was entered by a court of law to supposedly stop this program, correct?

A. That's correct.

Q. So we are talking about approximately a four-month period, right?

A. Yes, sir.

Q. And all four of those months really are during peak season here, aren't they?

A. Yeah.

Q. You understand that even High Tech lost business during that time?

A. I understand that High Tech wasn't terribly happy with the results of having been involved in the preferred provider program.

Q. And you found that out through testimony here or through your conversations with Tom Larkin?

A. I think both. It's hard for me to separate where I learned what.

Q. Well, regardless, you have no doubt about that being true, correct?

A. I have no doubt about that being true, [p. 4661] correct.

. . .

[p. 4663] Q. Okay. Let me go back then. I apologize. I think basically what you were telling the jury was assuming that the hospitals participating in the preferred provider program did not collectively have monopsony power, you would expected [sic] temp agency usage by the hospitals to go up. Is that a fair characterization?

A. That is a fair characterization.

Q. And in fact, sir, the usage went down, [p. 4664] didn't it?

A. I believe that's true.

EXCERPTS FROM TRIAL TESTIMONY OF JOAN MORETZ, DEFENSE WITNESS, WHO WAS THE NURSE LIAISON FOR THE PPP

[p. 2672] Thereupon, JOAN MORETZ, called as a witness on behalf of the Defendants, being by the Court first duly sworn, was examined and testified as follows:

. . .

[p. 2712] Q. Have you had an opportunity to read through the transcript of the sworn testimony that you gave in 1990 sometime prior to taking the witness stand today?

A. Yes.

Q. Let me ask you again, referring to that same deposition, ma'am, at page 29 of that deposition, beginning at line 23: [p. 2713]

> Q. As I understand it, you are saying the interview, or you first heard about the job January or February of 1989?
>
> A. Uh huh.
>
> Q. Is that right?
>
> A. Right.

Do you recall having given those responses under oath back in 1990?

A. Yes.

. . .

[p. 2716] Q. And as far as you got in the fulfillment of any of your responsibilities was talking about what you were going to do sometime in the future, correct?

A. No.

[p. 2717] Q. Well, you told us that you also developed this proposed form, Defendants' Exhibit 6224, a nursing quality control form, right?

A. Right.

Q. And this form is dated February 22, 1989, correct?

A. Right.

Q. This was going to be the tool that you were going to use to fulfill whatever quality related responsibilities you had, correct, ma'am?

A. This was the first draft.

Q. Do you have even one of these forms that's completed on even one nurse?

A. It hadn't been implemented as yet.

Q. Could you explain to the ladies and gentlemen of the jury how it is that this program that you have represented had as, at least one of its primary purposes, improvement of quality, and had a form that was to be the tool to improve quality, could have lasted from November to December to January to February and not have one completed form relating to quality ever filled out in that period of time?

A. What is your question?

Q. Can you explain to the ladies and [p. 2718] gentlemen of the jury how if a primary purpose of this program was improvement of quality, how it is that this quality form was never filled out even once in the entire history of the preferred provider program?

A. It was a new form. It was in draft. You wouldn't have put a form into place until you were sure or felt fairly sure that it would be accepted by all and it would be effective. And there had not been enough time to implement the program.

Q. Well, you are aware that the price controls got put in immediately, right?

A. Yes.

Q. But there were no quality controls that were ever implemented, were there, ma'am?

A. I believe there was. I believe we had initiated quality controls.

Q. You had initiated talking about initiating quality controls, right?

A. No. I believe my presence going and trying to work with both facilities, both hospital and agencies, was an attempt at trying to standardize quality so that we were communicating what our needs were.

Q. Okay. Maybe you would like to share with [p. 2719] us, if you would, then whatever documentary evidence exists that anything was ever done by the preferred provider program to improve quality? Is there anything at all that's been documented?

A. Just our preliminary meetings in February of that year.

Q. Which document the fact that you were talking about initiating quality controls?

A. Right.

. . .

[p. 2726] Q. Have you ever heard of an organization called the Palm Beach County Nursing Administrators Group?

A. Yes.

Q. What's your understanding of what that group is or was?

A. I believe it was a group of nursing administrators who jointly met to discuss common issues and problems we might be having within this county, as well as trying to improve quality of patient care.

Q. Did you have an understanding as to whether part of their discussions included quality of temp agency nurses?

A. I have no knowledge of that, but I would assume so.

Q. That organization, do you understand it, existed separate and apart from the preferred provider program, correct?

A. I believe so.

. . .

[p. 2727] Q. Did you have any concerns in your work with the preferred provider program with regard to what rates were being paid by temp agencies?

A. No.

Q. That was totally outside of the ambit of your responsibility, correct?

A. Correct.

Q. In fact, by the time you came there the [p. 2728] whole pricing issue was a fait accompli; isn't that true? It was already an established fact of what was being paid, correct?

A. Yes.

Q. Same is true with regard to the issue of whether there would be any limitations on the number of preferred agencies that would participate, correct? That was already decided before you came, correct?

A. Yes.

. . .

[p. 2729] Q. . . . How was this program going to work? Were the hospitals going to call you and say we need nurses for such and such time slot and then you were going to call the agencies and fill that for them?

A. No.

Q. How was it going to work then?

A. The calls went directly to the agencies.

Q. From the hospitals?

[p. 2730] A. Yes.

. . .

[p. 2731] Q. Isn't it true that in your investigation you found that these hospitals already had quality standards in place?

A. Yes.

Q. In fact, they were required to have quality standards in place, weren't they?

A. Yes.

Q. Would have been very irresponsible for them not to, wouldn't it?

A. Yes.

Q. Do you recall learning while you were involved in the preferred provider program that the hospitals were experiencing a slow season and were not placing as many orders with the preferreds as the preferred agencies had expected? Does that strike a familiar note?

A. Yes.

. . .

[p. 2734] Q. And in fact, there was a, as you described it before, a significant nursing shortage at that time; is that right, ma'am?

A. Yes.

Q. And in order to – was it your understanding, however, that in spite of that shortage, very shortly after the program went into effect, the hospitals were reporting that they had an unexpected drop in demand for nurses; isn't that right, ma'am?

A. Yes.

Q. In spite of the fact that you were going into the season in Palm Beach County when census should be up, that is November, December, January, hospital admissions in census are traditionally up in that period of time?

A. Yes.

Q. But in spite of that, and in spite of the fact that the hospitals were largely directing their business toward

eight preferred providers, the hospitals were reporting that their demand for temporary nursing services was unexpectedly down immediately after the program; is that right, [p. 2735] ma'am?

A. Yes.

EXCERPT FROM TRIAL TESTIMONY OF SHARYN TREMBLAY ROETTGER, DEFENSE WITNESS, FORMER ASSISTANT ADMINISTRATOR OF NURSING SERVICE FOR DEFENDANT WELLINGTON REGIONAL MEDICAL CENTER

[p. 2869] Thereupon, Sharyn Tremblay Roettger, called as a witness on behalf of the defendants, being by the court first duly sworn, was examined and testified as follows:

. . .

[p. 2931] Q. And isn't it true that really your purpose, one of your purposes at least insofar as agency is concerned, insofar as nursing agency is [p. 2932] concerned from the beginning of your employment at Wellington up through July of 1989 was to try to reduce or eliminate agency usage in the hospital?

A. Correct.

Q. And the preferred provider program was a step in that direction –

A. Yes.

Q. – is that right? And by July of 1989 your agency usage was down significantly in large part because of an increase of nurses that had come on staff; is that right, ma'am?

A. That and the fact that it's the summer months and the census goes down in the summer.

Q. Okay. But that happens every summer.

A. Yes.

Q. But the unusual thing was that in the midst of this crisis of nursing shortage Wellington Hospital after the

preferred provider program had a significant increase of the number of nurses that had taken or accepted full-time employment or per diem status.

A. True.

Q. And isn't it really true, ma'am, that that increase, that influx of people taking [p. 2933] positions at the hospital that they previously had not wanted to take was a result of this preferred provider program? Didn't that cause the nurses to come back and take those positions at the hospital you previously hadn't been able to fill?

A. True.

EXCERPTS FROM TRIAL TESTIMONY OF LINDA WADKINS, DEFENSE WITNESS, FORMER VICE PRESIDENT OF PATIENT SERVICES FOR DEFENDANT BETHESDA MEMORIAL HOSPITAL

[p. 3008] Thereupon, LINDA WADKINS, called as a witness on behalf of the Defendants, being by the Court first duly sworn, was examined and testified as follows:

. . .

[p. 3090] Q. Didn't the preferred agencies start complaining in January because they weren't getting the calls from the hospitals that participated in the program, including Bethesda, that they expected?

A. I believe so. I don't know if it was in January. But at some point in time there was that complaint that they weren't getting volume.

Q. That was before the injunction came along, right?

A. When did the injunction exactly come along?

Q. Well, let's assume it was February 21, 1989.

A. Then if that happened in January it was before then. But I don't really remember when they complained is what I said. I do know they complained, but I don't remember when.

. . .

[p. 3092] Q. And that would have included November, December of 1988, correct? You were there then, right?

A. I was there. But I don't know if that's exactly when we had an increase that year. But I am telling you it's

probable that we did have an increase that year because almost every year we did have one.

Q. As of the time the preferred provider program was put into effect, Bethesda could offer more money to its nurses, to nurses to attract them, correct?

A. When it was put in effect?

Q. Yes. Nothing was stopping you under the preferred provider program from offering more money –

[p. 3093] A. No nothing was stopping us.

Q. – just like you mentioned, right?

A. Right.

Q. But the preferred provider agencies weren't in that position, were they?

A. To offer their nurses more money?

Q. Right. They couldn't do that, could they?

A. I guess if they decided their profits could be less, they could. I don't know what their individual profit margins were. But they probably had to look at that.

Q. Well, they were locked into a ceiling – they were locked into rates for an entire year, were they not, under that program?

A. That's correct.

EXCERPT FROM TRIAL TESTIMONY OF MIMI LARKIN, DEFENSE WITNESS, DIRECTOR OF NURSING FOR DEFENDANT HIGH TECH

[p. 3795] Thereupon, Mimi Larkin, called as a witness on behalf of the defendants, being by the Court previously first duly sworn, was further examined and testified as follows:

. . .

[p. 3801] Q. Was it your belief at the time that you were announced as being a preferred provider, that is, at the time High Tech was selected as a preferred provider, that that was going to mean an increase in volume for hospital staffing for High Tech?

A. That's what we thought.

Q. That didn't happen, did it?

A. No.

Q. In fact, ma'am, during the few months that the preferred provider program was officially in place before the injunction High Tech's hospital staffing business went down, didn't it?

A. Yes.

EXCERPT FROM TRIAL TESTIMONY OF JUNE DAUGHERTY, DEFENSE WITNESS, CHIEF NURSING OFFICER FOR FORMER DEFENDANT PALMS WEST HOSPITAL

[p. 2736] Thereupon, JUNE DAUGHERTY, called as a witness on behalf of the Defendants, being by the Court first duly sworn, was examined and testified as follows:

. . .

[p. 2784] Q. Okay. Palm Beach County nursing administrators, they have a group, don't they?

A. Yes, we do.

Q. Are you part of that group?

A. Yes, sir.

Q. That existed before the preferred provider program ever was dreamed up; isn't that true?

A. Yes, sir.

Q. Did you ever discuss agency problems at [p. 2785] the meetings of that group?

A. Yes, we did.

Q. You were concerned as a group about quality of agencies, weren't you?

A. Yes, sir.

Q. I mean, among other things. That was one of the things, wasn't it?

A. Yes, sir.

Q. Okay. Was there any reason you can think of for why you folks at that nursing organization couldn't have gotten together and just sought to have quality standards addressed for all temp agency nurses without getting into issues of price and long-term contracts? Is there anything to have stopped you from doing that?

A. We did not have anyone to lead us in that.

Q. Could you have selected a leader?

A. Yes, sir.

Q. Peter Faron, he was a member of that group, wasn't he?

A. Yes, he was.

Q. He took quite an active leadership role in this PPP, this preferred provider program; isn't that true?

[p. 2786] A. I remember that he did, yes.

Q. Could Peter Faron have led you, that is this group of nursing administrators, into a program for quality that had nothing whatever to do with price?

A. I am sorry, I don't know that.

Q. Do you have any reason to believe that couldn't have happened?

A. I don't have any reason to believe it could not have happened, no.